

VETERANS FOR PEACE GREATER SEATTLE, CHAPTER 92, *et al.*,

Plaintiffs,

v.

CITY OF SEATTLE, *et al.*,

Defendants.

This matter comes before the Court on Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction. (Dkt. #4). Plaintiffs, a group of homeless individuals currently occupying an encampment in the City of Seattle, seek to prevent Defendants from sweeping the encampment. For the reasons set forth below, the Court finds that Plaintiffs fall short of meeting the high legal standards necessary for injunctive relief, and therefore DENIES Plaintiffs’ motion.

A. Background

ORDER
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1 northern portion of this lot is owned by the City of Seattle, while the southern portion is
2 owned by the Washington State Department of Transportation (“WSDOT”). (See Dkt. #4,
3 Ex. C). The encampment at-issue in this lawsuit, also known as “Nickelsville,” is situated on
4 the area that is administered by the WSDOT.

5 Plaintiffs originally established “Nickelsville” on or around September 22, 2008, on the
6 portion of the lot owned by the City of Seattle. “Nickelsville” is a project of the nonprofit
7 corporation Veterans for Peace Greater Seattle, Chapter 92, a named Plaintiff in this action.
8 The participants of “Nickelsville” include both homeless and housed individuals, and its goal
9 is to find suitable and permanent housing for homeless individuals of Seattle.

10 Three days after Plaintiffs arrived, the City conducted a sweep of “Nickelsville.”
11 Plaintiffs indicate that the City wrongfully arrested approximately 25 individuals for
12 trespassing, and also seized and destroyed property belonging to the inhabitants. The
13 individuals dispersed and relocated at several different sites around the City, primarily on
14 private or church property.

15 Shortly after the sweep, WSDOT Secretary Paula Hammond, on behalf of Governor
16 Christine Gregoire, notified Mayor Greg Nickels that “as the owner of the land parcel
17 adjacent to the current site of the homeless demonstration on City of Seattle property, [the
18 State of Washington] *expressly denies permission* . . . for City of Seattle employees or law
19 enforcement to cross, arrest, or remove any citizens from State property.” (Dkt. #4, Ex. D)
20 (emphasis in original). Ms. Hammond further advised Mayor Nickels to “encourage all
21 parties to immediately engage in meaningful discussions with groups who, like the Governor,
22 care passionately about homelessness in our State.” (*Id.*).

23 Plaintiffs indicate that as a result of what they believed was good will from the State,
24 they moved back on the portion of the lot owned by the WSDOT on June 6, 2009. However,
25 the WSDOT issued a notice of unauthorized use and trespass on June 9, 2009. Since that
26 time, it appears that the WSDOT and Plaintiffs have attempted to reach a suitable solution,
27 but no such resolution has been reached. Consequently, on July 20, 2009, the WSDOT
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1 notified Plaintiffs that they must vacate the property by 7 p.m. on Thursday, July 23, 2009.

2 Ms. Hammond, on behalf of the WSDOT, specifically informed Plaintiffs:

3 As you know, by moving your encampment on to State of Washington property without
4 authorization on June 6th, you have been trespassing and we provided you with notice of
such on June 9th.

5 In our discussions, we have agreed that WSDOT is a transportation agency, and is not
6 prepared to host an encampment. The site is not suitable for long-term habitation, and
7 staying here could jeopardize your health.

8 The City of Seattle has notified us that the state is in violation of health and safety
9 ordinances. As a result of the violation notice and the expiration of our agreed upon
deadline to come to a decision, the encampment can no longer stay on DOT property.

10 In addition, WSDOT does not have authority to make this site, which is public property,
11 available to you, as that would be an inappropriate gift of public funds. Our attorneys
have also advised that your presence on this property poses liability risks for WSDOT.

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13 A temporary move to a healthier and more appropriate location would serve you better
14 than to remain where you are, which is not acceptable or safe. In addition, you will
commit a criminal trespass if you remain on the property.

15 You must therefore vacate this piece of property within the next 72 hours.

16 (Dkt. #4, Ex. F).

17 One day after receiving this notice, Plaintiffs filed the instant lawsuit in this Court.
18 Plaintiffs simultaneously brought a motion for temporary restraining order (“TRO”) and
19 preliminary injunction enjoining the WSDOT from performing a sweep of their encampment.
20 The Court issued a minute order on Thursday, July 23, 2009 denying Plaintiffs’ motion in
21 order to provide immediate notification to the parties implicated in this lawsuit. The Court’s
22 specific reasons for denying Plaintiffs’ motion are set forth below.

23 **B. FRCP 65**

24 Pursuant to FRCP 65, “[t]he Court may issue a temporary restraining order without
25 written or oral notice to the adverse party or its attorney only if: (A) specific facts in an
26 affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or
27 damage will result to the movant before the adverse party can be heard in opposition; and (B)
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1 the movant's attorney certifies in writing any efforts made to give notice and the reasons why
2 it should not be required." FRCP 65(b)(1)(A)-(B).

3 Here, and based on FRCP 65(b)(1)(B) alone, the Court has sufficient grounds to deny
4 Plaintiffs' motion. Plaintiffs' counsel has failed to certify in writing why a TRO should issue
5 without notice to Defendants. In fact, Plaintiffs' counsel has not even filed a declaration or
6 affidavit in this regard. Nevertheless, Plaintiffs are not prejudiced by this failure, as the legal
7 arguments raised by their motion fall significantly short of the issuance of either a TRO or a
8 preliminary injunction.

9 In order to obtain injunctive relief, the party seeking the injunction must demonstrate
10 that "he is *likely* to succeed on the merits [and] that he is *likely* to suffer irreparable harm in
11 the absence of preliminary relief." *Winter v. Natural Resources Defense Council, Inc.*, 129
12 S.Ct. 365, 374 (2008) (emphasis added). The Supreme Court recently imposed this new
13 standard that clarifies the contours of the test previously employed by the Ninth Circuit. This
14 test required a party seeking an injunction to show "probable" success on the merits and the
15 "possibility" of irreparable harm. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004,
16 1013 (9th Cir. 2001).

17 Despite this change, the well-recognized "sliding scale" approach with respect to
18 injunctive relief remains intact. *See Winter*, 129 S.Ct. at 393 (J. Ginsburg, dissenting) ("This
19 Court has never rejected [the sliding scale] formulation, and I do not believe it does so
20 today."). This approach requires courts to view success on the merits and irreparable harm as
21 "two points on a sliding scale in which the required degree of irreparable harm increases as
22 the probability of success decreases." *Napster*, 239 F.3d at 1013 (internal citation and
23 quotation omitted). In other words, the greater the relative hardship to the party seeking the
24 injunction, the less the probability of success must be shown, and vice versa. *See Clear*
25 *Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003).

26 A plaintiff seeking a preliminary injunction must also show "that the balance of equities
27 tips in his favor, and that an injunction is in the public interest." *Winter*, 129 S.Ct. at 374
28 (citations omitted). "Because a preliminary injunction is an extraordinary remedy, the

1 movant's right to relief must be clear and unequivocal." *Wilderness Workshop v. U.S. Bureau*
2 *of Land Management*, 531 F.3d 1220, 1224 (10th Cir. 2008) (citation omitted).

3 **1. Irreparable Injury**

4 Plaintiffs claim that it is undeniable that a sweep of the encampment would inflict
5 irreparable harm upon them. In support of this argument, Plaintiffs make general arguments
6 about the potentially devastating effect of losing one's home, community, and belongings.
7 The Court unequivocally agrees with these universal principles. "The specter of losing one's
8 domicile, however primitive, is deeply troubling." *Davison v. City of Tuscon*, 924 F.Supp.
9 989, 992 (D.Ariz. 1996). Being forced to relocate is an injury in which monetary damages are
10 not a sufficient substitution for the harm inflicted. *See Nelson v. Nat'l Aeronautics and Space*
11 *Admin.*, 530 F.3d 865, 881-882 (9th Cir. 2008). Moreover, the emotional damages and stress
12 associated with such a loss can be a significant injury.

13 Despite these principles, the irreparable nature of the harm potentially imposed on
14 Plaintiffs in this specific case is not as substantial as Plaintiffs represent to the Court. The
15 current encampment has only been in place since June 6, 2009. And as Plaintiffs themselves
16 acknowledge, the population of "Nickelsville" ranges from between 50-100 residents out of
17 an approximately 8,400 homeless residents in the City of Seattle. In other words,
18 "Nickelsville" is far from a permanent establishment. Had this encampment been in place for
19 a significant period of time with more established residents, the potential for irreparable injury
20 would be greater.

21 Relatedly, the record establishes that Plaintiffs are not completely without solutions if
22 they are forced to leave their current encampment. Ms. Hammond notified Plaintiffs:

23 We remain willing to help. Social workers from the state have visited your
24 encampment on several occasions to assist food banks, and offer help with employment
25 placement and health care. More appropriate resources are available in the King
County area for people who need assistance finding food, housing, medical services and
employment.

26 (Dkt. #4, Ex. F).
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1 The record also establishes that Plaintiffs have “had offers from faith organizations to
2 host [them] on a temporary basis and that [Plaintiffs] have declined these generous offers.”
3 (*Id.*). Plaintiffs do not dispute these contentions in any of their pleadings.

4 The Court also finds little merit in Plaintiffs’ contention that “an alleged constitutional
5 infringement will often alone constitute irreparable harm.” (Dkt. #4 at 12) (citing *Monterey*
6 *Mechanical Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997)). While this principle is correct,
7 the Court fails to see which constitutional rights are being infringed in this case. As explained
8 in more detail below, the right to travel and the right to be free from the Eighth Amendment’s
9 ban on cruel and unusual punishment – the constitutional rights Plaintiffs allege are being
10 infringed – do not directly apply in this case. Thus, Plaintiffs cannot clearly lay out a case of
11 irreparable harm.

12 Therefore while the Court does not argue with Plaintiffs’ general contentions about the
13 irreparable harm one would face if their home was lost, Plaintiffs fail to establish why these
14 general principles apply to the specific facts of this case.

15 **2. Success on the Merits**

16 Notwithstanding the relative strengths and weaknesses of Plaintiffs’ arguments with
17 respect to irreparable injury, an injunction cannot issue in this case because Plaintiffs fail to
18 justify that they will succeed on the merits. Here, Plaintiffs contend they will succeed
19 because they have a fundamental right to travel, and a right to be free from the Eight
20 Amendment’s ban on cruel and unusual punishment. Plaintiffs further argue that the City and
21 the WSDOT do not have any compelling interests in sweeping their encampment. Each of
22 these arguments lacks merit.

23 With respect to the right to travel, the Court recognizes that this is a fundamental
24 constitutional right. *See Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254 (1974)
25 (“The right of interstate travel has repeatedly been recognized as a basic constitutional
26 freedom.”). “Preventing homeless individuals from performing activities that are ‘necessities
27 of life,’ such as sleeping, in any public place when they have nowhere else to go effectively
28 penalizes migration.” *Pottinger v. City of Miami*, 810 F.Supp. 1551, 1580 (S.D.Fla. 1992).

1 Nevertheless, this right is not directly implicated when individuals simply seek to remain at a
2 certain place. *See Davison*, 924 F.Supp. at 993. The right also “does not confer immunity
3 against local trespass laws and does not create a right to remain without regard to the
4 ownership of the property on which [an individual] chooses to live or stay, be it public or
5 privately owned property.” *Tobe v. City of Santa Ana*, 892 P.2d 11245, 1165 (1995). As a
6 result, it is clear that the residents of “Nickelsville” cannot invoke the fundamental right to
7 travel in justifying their desire to remain on WSDOT property without permission.

8 Even if the right to travel was implicated in this case, the government has a compelling
9 interest in curbing this right. It is well-settled that any regulations or government action
10 prohibiting or otherwise penalizing the right to travel “must promote a compelling
11 governmental interest in order to survive constitutional scrutiny.” *Roulette v. City of Seattle*,
12 850 F.Supp. 1442, 1447 (W.D.Wa. 1994) (citing *Shapiro v. Thompson*, 394 U.S. 618 (1969)
13 and *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986)).

14 In the instant case, the Court finds that the WSDOT has several compelling interests in
15 effectuating the sweep. First, cities have a substantial interest in protecting its public spaces.
16 *See Pottinger*, 810 F.Supp. at 1581 (recognizing that a city has a legitimate interest in
17 maintaining facilities in public areas). In fact, this district court has specifically held that the
18 City of Seattle’s interest in protecting public safety and promoting the economic health of its
19 commercial areas is substantial. *See Roulette*, 850 F.Supp. at 1448. Plaintiffs acknowledge
20 these interests, expressly stating that they “concede that some of Defendants’ stated objective
21 could potentially pass muster as ‘compelling’ governmental objectives, such as protecting
22 public health and controlling violent crime.” (Dkt. #4 at 22). These interests were also made
23 clear to Plaintiffs when Ms. Hammond informed the residents of “Nickelsville” that the site is
24 not suitable for long-term habitation, and could potentially jeopardize Plaintiffs’ health and
25 safety. (Dkt. #4, Ex. F).

26 Second, Ms. Hammond also informed Plaintiffs that the WSDOT “does not have the
27 authority to make this site, which is public property, available to you, *as that would be an*
28 *inappropriate gift of public funds . . . [Y]our presence on this property poses liability risks for*

1 WSDOT.” (*Id.*) (emphasis added). The Court agrees with the WSDOT that these are
2 legitimate interests. In particular, the potential liability WSDOT faces by permitting such an
3 encampment to continue on its property is substantial. Plaintiffs themselves inform the Court
4 that these risks are very real, as highlighted by the recent death of a homeless man sleeping on
5 WSDOT property who was run over by a WSDOT brush-clearing machine. (Dkt. #4 at 2-3).

6 Next, the practical considerations in justifying a sweep are likewise compelling.
7 “Nickelsville” is currently on WSDOT property, and WSDOT is a transportation agency of
8 the State of Washington. The WSDOT is obviously unequipped to manage or otherwise
9 maintain a homeless encampment on its property. Indeed, Plaintiffs repeatedly argue that it is
10 the City’s responsibility to provide adequate shelter for its homeless citizens, and
11 simultaneously fail to show how the WSDOT is responsible for providing adequate housing.
12 Under such circumstances, Plaintiffs’ right to travel is significantly outweighed by the
13 governmental interests at stake.

14 With respect to the Eighth Amendment’s ban on cruel and unusual punishment,
15 Plaintiffs cannot dispute that this constitutional right “was designed to protect those *convicted*
16 *of crimes.*” *Whitley v. Albers*, 475 U.S. 312, 318 (1986) (emphasis added) (citing *Ingraham v.*
17 *Wright*, 430 U.S. 651, 664 (1977)). The clause applies “only after the State has complied with
18 the constitutional guarantees traditionally associated with criminal prosecutions.” *Ingraham*,
19 430 U.S. at 671, n.40. Here, and although the WSDOT has notified Plaintiffs that they are
20 potentially in violation of criminal trespass, no individual has been arrested under the trespass
21 statute and no individual has begun the process of prosecution.

22 In addition, the opinion Plaintiffs rely heavily upon in arguing that the Eight
23 Amendment should apply in this case has been vacated. *See Jones v. City of Los Angeles*, 444
24 F.3d 1118 (9th Cir. 2006). Upon a request by the parties in that case to withdraw the opinion,
25 the Ninth Circuit clearly stated that “we dismiss this appeal as moot [and] vacate our opinion
26 in *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006)[.]” *Jones v. City of Los*
27 *Angeles*, 505 F.3d 1006 (9th Cir. 2007). Accordingly, the Eight Amendment’s cruel and
28 unusual punishments clause very clearly does not apply.

1 Overall, the Court is sensitive to the plight of the homeless and their need for shelter.
2 The Court is likewise receptive to the majority of Plaintiffs' contentions that a permanent
3 solution to the issue of homelessness in the City of Seattle is needed. The legal principle that
4 nonetheless applies to this motion is that a temporary restraining order or a preliminary
5 injunction is an "*extraordinary* equitable remedy, and one that should only issue when the
6 movant's right to relief [is] *clear and unequivocal*." *Wilderness Workshop*, 531 F.3d at 1224
7 (emphasis added). The WSDOT has a legitimate interest in prohibiting homeless
8 encampments on its property, and the attenuated constitutional rights Plaintiffs claim are
9 being implicated by this action simply do not justify the issuance of Plaintiffs' requested
10 relief. Furthermore, because Plaintiffs cannot show they will succeed on the merits, the Court
11 finds no reason to discuss whether Plaintiffs can show "that the balance of equities tips in
12 [their] favor, and that an injunction is in the public interest." *Winter*, 129 S.Ct. at 374.

13 **III. CONCLUSION**

14 Having reviewed the relevant pleadings, the declarations and exhibits attached thereto,
15 and the remainder of the record, the Court hereby finds and ORDERS:

16 (1) Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction
17 (Dkt. #4) is DENIED.

18 (2) The Clerk is directed to forward a copy of this Order to all counsel of record.

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20 DATED this 24th day of July, 2009.

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23 RICARDO S. MARTINEZ
24 UNITED STATES DISTRICT JUDGE
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